U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Jun2001

CASE NO.: 1999-LHC-1976

OWCP NO.: 08-113043

IN THE MATTER OF:

CALEB LINSCOMB

Claimant

v.

TRINITY MARINE INDUSTRIES, INC.

Employer

and

RELIANCE NATIONAL INDEMNITY COMPANY

Carrier

APPEARANCES:

JOHN D. McELROY, ESQ.

For the Claimant

DOUGLASS M. MORAGAS, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et

seq., brought by Caleb Linscomb (Claimant) against Trinity Marine (Employer) and Reliance National Indemnity Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges on May 19, 1999, for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on February 12, 2001, in Beaumont, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered nine exhibits while Employer/Carrier proffered six exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer/Carrier on April 30, 2001. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That an injury/accident occurred on May 12, 1997, within the course and scope of Claimant's employment.

2. That an employee-employer relationship existed at the time of the accident/injury.

3. That Employer was notified of the accident/injury on May 12, 1997.

4. That Employer filed Notices of Controversion on June 26, 1997 and January 5, 1999.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-__ .

5. That Claimant's average weekly wage at the time of injury was $370.00.

6. That temporary total disability benefits were paid from June 20, 1997 to December 25, 1998 at the rate of $246.67 per week for a total of $19,523.00 in disability benefits paid to Claimant.

7. That medical benefits have been paid by Employer/Carrier pursuant to Section 7 of the Act.

8. That maximum medical improvement was established on April 1, 1998.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of Claimant's disability.

2. Penalties, interest and attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified he is twenty-four years old and is a high school graduate living in Orange, Texas. (Tr. 29, 69). He earned a welding certificate from ABC Welding after high school. (Tr. 31). Before earning his welding certificate, Claimant worked with Crown Pipe Shop as a pipefitter helper from August 1995 to March 1997. (Tr. 31-32, 34, 78).

Claimant began working as a welder trainee with Employer in Orange, Texas, on March 3, 1997, and was injured on May 12, 1997. (Tr. 32). When he was injured, Claimant was working as a welder-fitter on a panel line. (Tr. 34). He reported falling off a table which was about two and a half feet off the ground and landing on an I-beam. He notified his supervisor, LeRoy Truitt, after the accident. He reported feeling some pain after the fall, but after about 15 minutes, "it started feeling like it was a pulled muscle in my back." He left work an hour later because the pain was "so bad." (Tr. 35).

Claimant took Tylenol the night of the accident for his pain. (Tr. 35). The following day, he informed his supervisor he was experiencing problems walking. His supervisor sent him to Dr. Howard Williams, the company doctor. Claimant eventually treated with Dr. Rudeseal, a chiropractor, for spinal relief. He confirmed treating with Drs. Williams and Rudeseal concurrently for about four to six weeks after the accident. (Tr. 37-38).

Claimant next treated with Dr. John Raggio, a neurosurgeon, in Lake Charles, Louisiana, and then treated with Dr. Charles Neblett, a neurosurgeon in Houston, Texas, to whom he was referred by Dr. Rudeseal. (Tr. 38, 101). Dr. Raggio ordered a CT scan and Dr. Neblett ordered an MRI. Based on these tests, and Claimant's complaints of back pain and numbness in his right leg, Dr. Neblett performed back surgery on August 25, 1997, to correct Claimant's herniated disks at L4-L5 and L5-S1. (Tr. 39, 58). After the surgery, Dr. Neblett recommended walking everyday and routine exercises for rehabilitation, but did not prescribe a work-hardening program. (Tr. 40).

After the surgery, Claimant testified the pain in his right leg subsided because the nerves were dead. He reported his right leg is currently numb from his kneecap "all the way down the back of the calf, all the way to my big toe . . . across the top of the ankle." (Tr. 59). Before and immediately after the surgery, Claimant reported no problems in his left leg. (Tr. 59-60). About three months after the surgery, Claimant reported he began experiencing a "hurting sensation in my left leg. It took me about three months to learn how to walk again after I had surgery, because I had so much nerve damage that I lost the sensation in my big toe. I couldn't walk. And all the balance is in your big toe, so I had to learn to walk again." (Tr. 60).

Dr. Neblett released Claimant to "try to do some kind of work" on April 1, 1998. (Tr. 40). Claimant confirmed Dr. Neblett did not specify any limitations on walking, standing or lifting. (Tr. 40-41). Claimant reported Dr. Neblett told him to "know your own limitations . . . don't do any more than what you know you can't do." (Tr. 41).

Claimant testified he has problems standing for long periods, long-distance walking, bending over, sitting down, and "just everyday, routine things." (Tr. 41, 75-76). He has engaged in efforts with vocational rehabilitation with the U.S. Department of Labor (DOL) to return to work. (Tr. 42-43). He

reported DOL was "supposed to further me in some kind of school or training to put me back in a work field that I could be more suitable with." He confirmed "after dealing with them for a while," it did not "appear" DOL was interested in trying to retrain him. (Tr. 43).

Claimant reported DOL was "just trying to put me back in some kind of a job, any job that they could suitably find, didn't matter what it was." He noted some of the jobs recommended were "things I never had training in before, didn't know anything about . . . and some of the wages and some of the places the jobs were located at . . . were just out of my driving distances . . ." (Tr. 43). He then attempted to look for a driving job on his own. (Tr. 44). He was "mainly" supported by his parents during the period he was out of work. (Tr. 45).

Claimant returned to work on May 12, 1999, with Crown Pipe Shop driving a cherrypicker, typing and making labels for the pipes earning about $8.50 an hour. (Tr. 44-45, 79-80). He performed light work and stated he would not have attained the job with Crown Pipe Shop if not for his father's friendship with his supervisor at Crown Pipe Shop. (Tr. 47, 79). He worked with Crown Pipe Shop until July 1999 when he was laid off. (Tr. 46).

Claimant then worked for TDI-Halter, a shipbuilder in Orange, Texas, from August 2, 1999 to December 23, 1999, when he was laid off because the shop work was finished. (Tr. 47-48). While with TDI-Halter, he had a shop position, performing welding and fitting. While working for TDI-Halter, the company became Friede Goldman-Halter. (Tr. 48).

Claimant testified he was called back to Friede Goldman-Halter within a week, but was physically unable to perform the work available. Specifically, he was required to climb stairways which were 80 feet long and carry strenuous loads. (Tr. 49-50, 82). He was earning $10.70 per hour working for Friede Goldman-Halter. (Tr. 82).

Claimant began working for Triangle Industrial Service operating a vacuum truck in February 2000. (Tr. 50). He worked until April 2000 when he quit because the work was too strenuous as he was expected to drag heavy four-inch hoses. (Tr. 51). He next took a part-time summer job working for Orange County,

Texas, performing road and bridge repairs. He took a pay cut, but was able to perform the work "without coming home hurting every day." (Tr. 51-52, 83). Specifically, he was shoving asphalt, digging out holes in the road and leveling the road on his hands and knees. When he informed his superiors he was unable to continue performing this type of work, he was allowed to cut grass. He was eventually transferred to a position driving a water truck and operating machinery which did not involve manual labor. (Tr. 53). Claimant confirmed he was able to perform this latter position with tolerable pain. He emphasized he "had to make money; I had to pay my bills." (Tr. 55). He worked with Orange County, Texas, until "July or August" 2000 and earned $6.57 per hour. (Tr. 56, 83).

Claimant testified there has never been a time since the May 12, 1997 work accident when he has been "pain-free." (Tr. 55-56). He next went to work for Orange Shipbuilding as a fitter helper in August 2000. (Tr. 56-57). He held this position for "about a month" but had to leave because he could not perform the work requirements. Specifically, he had trouble crawling in and out of vessels through the tight quarters, lifting, pulling and holding up brackets while they were tacked up. (Tr. 57).

While he was employed with Orange Shipbuilding, he continued to treat with Dr. Neblett due to his "severe back pain," leg numbness "and a sensation of being hurt again." (Tr. 58).

Claimant testified he began having "a hurting sensation" in his left leg about three months after the August 1997 surgery. (Tr. 60). He reported Dr. Neblett took him off work in August 2000 due to his increased pain. (Tr. 61).

Dr. Neblett referred Claimant to Dr. Radko in Houston, Texas, for epidural steroid injections. (Tr. 62). Claimant reported he was not interested in driving to Houston for the treatment and was not aware Dr. Radko had a treatment facility in Beaumont, Texas. He stated "if I knew then what I know now, I'd have went over probably and seen [Dr. Radko] and I'd have tried [the epidural steroid injections]. But I'd have probably still looked for further medical help." (Tr. 63, 102).

After leaving Orange Shipbuilding, Claimant began work in September 2000 with Frenchie's Exotic Game Ranch, which is owned by a friend, located north of Orange, Texas. (Tr. 68). At Frenchie's, Claimant operated machinery, drove tractors and a truck hauling feed and earned $6.00 per hour. (Tr. 69). He

confirmed he has continued to work for Frenchie's "off and on" since September 2000 at 25 to 35 hours weekly. (Tr. 70).

Claimant has also worked with Wayne's Air Conditioning where he started "about two weeks" after Frenchie's. At Wayne's Air Conditioning, Claimant assisted in installing air-conditioning units and mowing grass. He stated he did not work for both Frenchie's and Wayne's during the same week. (Tr. 71). He worked for Wayne's about three months and earned $8.50 per hour. (Tr. 71-72). He was not working for Wayne's at the time of the hearing as the "air-conditioning field slowed down." (Tr. 72).

Claimant testified he tries to work "the best I can" and has "to sponge off my family from time to time" to make a living. (Tr. 73). He confirmed a welding job would be "tolerable . . . with pain" but he did not feel such a job would be suitable as he needs more medical treatment. (Tr. 74).

On December 15, 1998, Claimant was examined by Dr. Barrash. (Tr. 76). Claimant testified his condition has worsened since December 1998. He confirmed if presented with the opportunity, he would enter a re-training program for nursing, but acknowledged he may have problems lifting patients. (Tr. 76, 111).

The Medical Evidence

Ronald W. Rudeseal, D.C.

Dr. Ronald Rudeseal, a chiropractor in Orange, Texas, initially examined Claimant on May 16, 1997 for treatment of injuries he sustained at work on May 12, 1997. In a June 3, 1997 letter to Employer, Dr. Rudeseal noted Claimant reported lifting an object at work, tripping and falling on his side. About an hour later, he noticed moderate to severe lumbosacral pain on certain movements. On physical examination, Claimant presented with bilateral lumbosacral muscle spasm. Dr. Rudeseal diagnosed a lumbar sprain/strain with associated lumbar vertebral segmental dysfunction, lumbalgia and muscle spasm. Dr. Rudeseal treated Claimant with spinal manipulation and electrical muscle stimulation. (CX-3, p. 78; CX-7, p. 1).

On May 27, 1997, Claimant was seen in follow-up and continued to report lumbosacral pain. Dr. Rudeseal initiated a series of therapy sessions. (CX-3, p. 78; CX-7, pp. 1-2).

On July 29, 1997, Dr. Rudeseal referred Claimant to Dr. Charles Neblett, a neurosurgeon in Houston, Texas. Dr. Rudeseal noted he had recommended a laminectomy and fusion with titanium pedicle screws for Claimant. (CX-3, p. 80).

Howard C. Williams, M.D.

Dr. Howard Williams, a family practitioner, initially examined Claimant on May 19, 1997, for a May 12, 1997 work injury. Claimant reported he had fallen backwards on a table at work when he picked up a piece of angle iron and hurt his lower back. Claimant denied any previous injuries to his lower back. X-rays were negative for fracture or injury to the joint. Dr. Williams diagnosed a lumbar muscle sprain and prescribed Nalfon and Darvocet. Claimant was issued a "guided work duty" slip. (CX-8, p. 2).

Claimant returned for follow-up examinations on May 23, 27, June 2, 13, 20 and 23, 1997. He continued to complain of back pain and expressed a desire to see a neurosurgeon. Dr. Williams issued light work duty slips until June 20, 1997, when he took Claimant off work. He released Claimant to the physician of his choice on June 23, 1997. (CX-8, p. 1).

Charles Robert Neblett, M.D.

Dr. Charles Neblett, a board-certified neurological surgeon, testified by deposition on February 1, 2001. (CX-3). He first examined Claimant on July 30, 1997, upon a referral from Dr. Rudeseal. (CX-3, pp. 8, 81). Claimant reported he had sustained an injury at work on May 12, 1997 when he fell while lifting a piece of metal. He reported experiencing a "burning sensation in his low back area" after the incident. He returned to work the following day and reported difficulty moving. He was examined in the employer's medical clinic and placed on light duty. He continued to experience increasing pain over the next several weeks but "still tried to do his work." (CX-3, p. 8).

On neurological examination, Dr. Neblett noted Claimant had tenderness and spasm in the gluteal musculature. He also found numbness and "some patchy hypalgesia"[2] over the dorsum of

[2] Hypalgesia is a decreased pain sense. Dorland's Illustrated Medical Dictionary 790 (28th ed. 1994)

Claimant's right foot, both medially and laterally. (CX-3, p. 9). Dr. Neblett ordered an MRI and suggested Claimant consider surgical treatment based on his neurological dysfunctions, limited range of motion, tenderness and spasm. (CX-3, p. 10).

An MRI was performed on July 30, 1997, which indicated Claimant had "broad, moderate sized herniation of the L5-S1 disc most prominent centrally" and "moderately large central herniation of the L4-5 disc." (CX-3, pp. 11, 83). A laminectomy and fusion to alleviate disc pressure was subsequently performed by Dr. Neblett on August 25, 1997. (CX-3, pp. 11-12, 90). On October 15, 1997, Dr. Neblett noted Claimant continued to show some weakness in his foot post-operatively. (CX-3, pp. 12, 91).

Dr. Neblett next examined Claimant on December 10, 1997, and reported Claimant had "no real pain" although he noted "a sensation of numbness remains present in [Claimant's] right great toe." (CX-3, p. 92).

Claimant was examined by Dr. Neblett on April 1, 1998. Dr. Neblett reported Claimant was "increasing his activities in a general manner and tolerating it reasonably well." Dr. Neblett concluded Claimant "has healed sufficiently to be considered a candidate for resumption of working responsibilities effective today, April 1, 1998." (CX-3, p. 93). Dr. Neblett testified he did not place any restrictions on Claimant and confirmed he told Claimant to "basically try to do what he could do." (CX-3, pp. 13-14). Dr. Neblett explained he did not want Claimant performing "repetitive heavy things that would put, over a long period of time, undue stress on the low back." (CX-3, p. 14).

Dr. Neblett next examined Claimant on August 16, 2000, for complaints of increased lower back pain since 1999. Claimant reported he had not been able to work since July 18, 2000. He was unable to stand for more than 10 to 15 minutes at a time without incapacitating pain. He reported pain from his low back into his left buttocks and down his left leg. (CX-3, pp. 15-16). He also reported numbness and weakness within his right foot and leg. On neurological examination, Claimant presented with tenderness and spasm in his left gluteal regions with patchy hypalgesia over the dorsum of both feet. (CX-3, pp. 16, 100). Dr. Neblett testified the inclusion of pain, numbness and weakness on Claimant's left side led him to the opinion that there was possible involvement of nerve roots at the same levels

as before. (CX-3, p. 16). He ordered an MRI which was performed on August 23, 2000. (CX-3, pp. 17, 100-101). On August 16, 2000, Dr. Neblett issued a "Disability Certificate" and reported Claimant was "Totally Incapacitated" from August 16, 2000 until "undetermined at this time." He noted on the Disability Certificate that Claimant "will have repeat MRI." (CX-3, p. 19; CX-4, p. 15).

The MRI showed changes at L4-L5 where there was some disc prominence on the left side. Dr. Neblett reported the radiologist opined this condition effected the nerve core "somewhat." Dr. Neblett testified his interpretation was that although this condition was present, significant compression of the nerve was not demonstrated by the MRI and therefore surgery was not warranted. The L5-S1 disc did not indicate any evidence of disc herniation. He recommended pain management treatment or a back rehabilitation program for Claimant based on these findings. (CX-3, pp. 18, 31). Dr. Neblett recommended Dr. Vladimir Radko, "a very good pain management expert," to carry out pain management for Claimant. (CX-3, p. 21). He testified that if Claimant continues to have problems similar to those in August 2000 "it would be very difficult for him to do any appreciable work, even sedentary work." In August 2000, Claimant needed "to seek other medical treatment." (CX-3, p. 22). He opined Claimant could not continue to perform heavy work and would have to modify his work responsibilities. (CX-3, p. 23).

On cross-examination, Dr. Neblett, after having been advised of Claimant's recent employment record at the animal ranch, air-conditioning work and cutting grass, opined Claimant is capable of working at those jobs at this time. (CX-3, pp. 26-27, 31-32). Dr. Neblett testified that if Claimant did not seek epidural steroid injections and chose not to have the injections, it did not appear Claimant was hurting so bad. (CX-3, p. 28). Upon review of jobs identified by Ms. Favaloro, Dr. Neblett opined jobs that require repetitive activities are not appropriate. (CX-3, p. 30). Dr. Neblett emphasized, based on his examinations and the MRI results, Claimant's complaints are legitimate. (CX-3, pp. 32-33).

Jay Martin Barrash, M.D.

Dr. Martin Barrash, a board-certified neurosurgeon, testified by deposition on February 21, 2001. (EX-5). He

initially examined Claimant on December 15, 1998, upon a referral from Elaine Ferrell of Platinum Safety and Claim Services. He received a history which indicated Claimant was injured on May 12, 1997, when he fell onto a table while lifting a piece of iron and hurt his back. (EX-4, p. 1; EX-5, p. 6). Claimant indicated he cannot lie comfortably at night due to the pain in his back which radiates to his feet. He uses pillows to elevate his feet in order to alleviate the pain. (EX-4, p. 1; EX-5, p. 7).

On neurological examination, Claimant reported decreased pin sensation in the right leg down to his ankle with his foot numb laterally. Dr. Barrash found no spasm. (EX-4, p. 2; EX-5, p. 8). He opined Claimant had a disc herniation at L4-L5 and recommended Claimant begin a vigorous exercise program. (EX-4, p. 2; EX-5, p. 9).

Dr. Barrash testified he had reviewed the CAT scan and MRI in Claimant's medical records. He noted in 1997, Claimant had herniation on his right side, and in August 2000, Claimant presented with herniation on his left side. (EX-5, p. 11). He opined the disc abnormality at L4-L5 is the cause of Claimant's left-sided problems. (EX-5, p. 39). He further opined Claimant's left-sided problems are not a natural progression and "maybe [Claimant] did something." He emphasized that when an individual has a surgical intervention, he becomes more "vulnerable" to injuries. (EX-5, p. 48).

Dr. Barrash examined Claimant again on February 20, 2001. Dr. Barrash reported Claimant's complaints had switched to his "left side." (EX-5, pp. 13, 25-26). He opined Claimant had a herniated disc at L4-L5 and L5-S1 on the left as opposed to the right. (EX-5, p. 14). He noted Dr. Neblett did not believe Claimant had herniation at L5-S1. He concurred with Dr. Neblett that epidural steroid injections are warranted before operating on Claimant because Claimant is "a young guy. You don't want to operate on him unless . . . you have to." (EX-5, p. 15). He recommended physical rehabilitation of Claimant's back with the epidural steroid injections. (EX-5, p. 17). He testified if these measures do not assist Claimant, he would recommend a laminotomy, which is the same surgery Claimant had in August 1997, but on the left side. (EX-5, p. 42).

Claimant reported to Dr. Barrash that he had returned to work with various employers since his August 1997 surgery and had worked with some pain but it did not affect his work. (EX-

5, p. 20). Dr. Barrash testified he would not send Claimant back to "heavy work" due to his herniated disc. Specifically, he would restrict Claimant from lifting 40 to 50 pounds and repetitive bending. Claimant "could walk as much as he was comfortable doing. Sitting, if he could get up and move around every once in a while, I think that would be fine for him." (EX-5, p. 22). He would not limit Claimant's climbing ladders or stairs. He would not restrict Claimant from squatting unless he were squatting six hours a day. (EX-5, p. 34). Dr. Barrash approved all the positions in the May 1999 labor market survey except the slot attendant position. (EX-1, pp. 15-17).

Dr. Barrash reviewed Ms. Favaloro's February 7, 2001 labor market survey and opined Claimant could perform the cash register position, cage cashier position, meter reader position, security guard position, parts clerk position, driver positions, service representative position, warehouse worker position and equipment operator position. He would not approve the vending route driver because of the bending and lifting of soft drink cases involved. (EX-5, p. 23). Dr. Barrash clarified he was concerned about the equipment operator position if the lifting were over 50 pounds. (EX-5, p. 24).

On further examination, Dr. Barrash recommended home exercises rather than formal physical therapy when he examined Claimant in December 1998. (EX-5, p. 31). He would place no restrictions on Claimant climbing ladders and stairs. Squatting was permissible but not six hours a day. (EX-5, p. 34). Dr. Barrash opined that a L4-L5 disk abnormality is causing Claimant's left-sided back/leg problems. (EX-5, p. 39). He testified that if pain management were not successful for Claimant, he would recommend a laminotomy on the left side of L4-L5. (EX-5, p. 42). He, like Dr. Neblett, would have released Claimant to do what he thought he could do, without any particular restrictions. (EX-5, p. 39).

The Vocational Evidence

Monica Hebert

Ms. Monica Hebert was requested by DOL to conduct vocational rehabilitation services for Claimant on October 30, 1997. (EX-3, p. 33). After several unsuccessful attempts to contact Claimant and notify him of possible job openings, she closed his file on July 14, 1998, due to Claimant's "continued lack of

availability and cooperation." (EX-3, pp. 1-2).

Nancy Favaloro

Ms. Nancy Favaloro was accepted as an expert in the field of vocational rehabilitation counseling. She received an assignment to render vocational rehabilitation services to Claimant in June 1998 based upon a referral by Elaine Farrell, a claims representative with Platinum Safety and Claims. (Tr. 117; EX-1, p. 32).

Ms. Favaloro met with Claimant on April 6, 1999. (Tr. 119). She conducted a vocational interview wherein she gathered Claimant's age, education, work history, medical information and his vocational interests. She reported Claimant had been released to return to regular work.[3] (Tr. 120). She administered vocational tests on which Claimant scored "very well." (Tr. 120-21).

Claimant reported his lifting restrictions were 50 pounds and walking "as tolerated." He could not perform frequent bending or stooping. (Tr. 122). She noted Dr. Neblett had assigned no restrictions to Claimant. (Tr. 123, 155-56).

Ms. Favaloro conducted a labor market survey on April 28, 1999, and sent the results to Claimant asking him to apply for the identified jobs. The labor market survey is dated May 23, 1999. (EX-1, p. 7). She first identified a shuttle bus driver position with Isle of Capri Casino in Lake Charles, Louisiana, which paid $6.75 per hour. The position required the driver to be seated for long periods with alternate standing and walking between routes. On rare occasions, the driver may have to assist passengers lift luggage. Frequent use of the upper extremities was required for driving. (Tr. 124; EX-1, p. 8).

Ms. Favaloro next identified a cage cashier position with Isle of Capri Casino which paid $7.00 per hour. This position required the individual to maintain a pleasant, friendly and welcoming attitude along with the ability to read, speak clearly and hear. The cashier must complete forms and perform basic

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[3] However, Dr. Neblett opined Claimant was "healed sufficiently to be considered a candidate for resumption of working responsibilities," (Tr. 157), but not to his former work at Employer. (Tr. 175-76).

math skills. A high school degree was required for this position. Standing was required 80 percent of the time and bending/lifting up to 25 pounds was required 20 percent of the time. (Tr. 124; EX-1, p. 8).

A slot attendant position with Isle of Capri Casino was next identified. The position paid $6.75 per hour and required the worker to handle customer relations and minor customer disputes. The worker must be able to read and write simple instructions. A high school diploma was required. The worker spent 40 percent of the time standing, 40 percent of the time walking, 10 percent of the time climbing stairs and 10 percent of the time was engaged in lifting/carrying up to 25 pounds. (Tr. 124; EX-1, p. 8).

Ms. Favaloro identified a "vending route position" with Moncla's Catering in Orange, Texas, wherein Claimant would be required to re-fill vending machines with soft drinks, candies and chips. The worker alternated sitting, standing and walking. Occasional lifting of up to 50 pounds was required and a dolly was used to transport products into buildings. The ability to enter and exit a vehicle was required. The wages were $8.50 to $9.00 per hour with the worker eventually earning a commission for which the worker can earn an average of $10.00 per hour. (Tr. 124; EX-1, p. 8).

An optical lab technician with Texas State Optical in Beaumont, Texas, was identified by Ms. Favaloro. The position required cutting, edging and dying work on optical lenses. A high school degree was required as was "good manual dexterity." The worker alternated standing and walking while sitting during breaks. Lifting was less than 15 pounds. The salary began at $5.15 per hour and after a 90-day evaluation, may be increased to $5.40 per hour. (Tr. 134; EX-1, p. 9).

Ms. Favaloro identified a position as a production worker with a manufacturing company in Beaumont, Texas. A high school degree was required and the position required the worker to be seated with standing and walking during breaks. Lifting did not exceed 20 pounds and there was frequent reaching. The starting salary was $6.65 per hour. (Tr. 127; EX-1, p. 9).

A delivery driver position with a Beaumont, Texas restaurant was next identified. The position required delivery of pizzas and other food orders to customers. The worker alternated sitting, standing and walking. Lifting was up to 25 pounds.

The starting salary was $5.15 per hour plus $.50 per delivery plus tips. The salary can average $7.00 to $8.00 per hour. (Tr. 128; EX-1, p. 9).

Ms. Favaloro identified an unarmed security guard position in Lake Charles, Louisiana. The duties varied depending on the post, e.g., the worker may guard a gate at a plant, or make rounds and complete incident reports as a patrolman. A clean police record was required. Some posts allowed the worker to alternate between sitting, standing and walking. Walking rounds once an hour for 15 minutes was required for some posts. No heavy lifting or strenuous physical demands were involved. The starting salary was between $5.15 and $6.25 per hour depending on the post. (EX-1, p. 9).

Ms. Favaloro reported Dr. Neblett approved only the optical lab technician, production worker and unarmed security guard positions. (Tr. 124-25; EX-1, pp. 12-14). She stated Dr. Neblett did not approve the other positions as they were "repetitive tasks." (Tr. 127, 194).[4] Ms. Favaloro testified "Dr. Neblett just seems a little inconsistent. He says [Claimant] can do the work of a heavy-equipment operator and then not drive a shuttle bus, and doesn't really explain why, other than that he says the heavy-equipment operator can take breaks during the day." (Tr. 126). She emphasized the shuttle bus driver and the cage cashier are positions wherein breaks are given. (Tr. 127). She further emphasized the positions listed are not repetitive tasks. (Tr. 194).

Dr. Barrash approved all the positions except for the slot attendant position. (Tr. 124; EX-1, pp. 15-17).[5]

Ms. Favaloro conducted a second labor market survey which is dated February 7, 2001. The first job she identified was an unarmed security officer position with Hermann Baptist Hospital in Beaumont, Texas. The position required patrolling the grounds on foot and sometimes driving a motorized golf cart.

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[4] Dr. Neblett testified he is concerned about the repetitiveness of the identified positions and reported his opinion as to acceptability or non-acceptability of the identified positions has not changed. (CX-3, p. 30).

[5] Dr. Barrash testified he approved the positions because the positions were "fairly nonvigorous jobs." (EX-5, p. 13).

Lifting was less than 50 pounds and occasional "at best." The Hospital did not quote wages, but other hospitals in the area quoted wages of $6.00 to $7.00 per hour. (Tr. 129-30; EX-1, p. 37).

The next position identified by Ms. Favaloro was a parts clerk with Auto Zone in Orange, Texas. The physical requirements involved alternately standing and walking and occasionally lifting up to 50 pounds. Workers may "occasionally walk out of the store to check someone's battery. The employer "would not discuss specific salaries, but other companies in the area pay $6.00 to $7.00 per hour." (Tr. 129-30; EX-1, p. 37).

An armored car driver with Brinks Security in Beaumont, Texas, was identified with physical requirements of sitting for periods of drive time and standing and walking during break periods or between stops. The vehicle has an automatic transmission. The employer would not specify wages, but the same employer paid $8.25 per hour in New Orleans, Louisiana, and $9.80 per hour in Houston, Texas. Ms. Favaloro estimated this position probably paid "more toward the lower range, since it's in Beaumont." (Tr. 131; EX-1, p. 37).

Ms. Favaloro identified a pest control technician position with SEGO Exterminators in Beaumont, Texas. Lifting was less than 20 pounds. The workers were required to "sometimes" crawl into small spaces. The salary was "a little over $10.00 per hour." (Tr. 132; EX-1, p. 37).

A vending route driver with Moncla's Catering in Orange, Texas, wherein Claimant would be required to re-fill vending machines with soft drinks, candies and chips. The worker alternated sitting, standing and walking. Occasional lifting of up to 50 pounds was required and a dolly was used to transport products into buildings. The ability to enter and exit a vehicle was required. The wages were $8.50 to $9.00 per hour. (Tr. 132; EX-1, p. 38).

Ms. Favaloro identified a cage cashier position with Isle of Capri Casino in Lake Charles, Louisiana, which paid $7.50 per hour. This position required the individual to maintain a pleasant, friendly and welcoming attitude along with the ability to read, speak clearly and hear. The cashier must complete forms and perform basic math skills. A high school degree was required for this position. Standing was required 80 percent of

the time and bending/lifting up to 25 pounds was required 20 percent of the time. (Tr. 132; EX-1, p. 38).

An electricity meter-reader position with PPM in Beaumont, Texas, was next identified. The worker traveled from house to house reading meters for electricity usage. Carrying of a small hand-held computer to input data was required. Lifting was under 10 pounds. Ms. Favaloro reported "each worker is required to do one route during an eight hour day, however, most workers complete this in four hours. They can take on another route for the afternoon. This worker is therefore able to work at his own pace. If the worker completes one route, he earns $8.00 per hour. If he completes two routes, he earns $128.00 per day which is double that or $16.00 per hour." (Tr. 132-34; EX-1, p. 38).

An optical lab technician with Texas State Optical in Beaumont, Texas, was identified by Ms. Favaloro. The position required cutting, edging and dying work on optical lenses. A high school degree was required as was "good manual dexterity." The worker alternated standing and walking while sitting during breaks. Lifting was less than fifteen pounds. The salary began at $5.15 per hour and after a 90-day evaluation, may be increased to $5.40 per hour. (Tr. 134; EX-1, p. 38).

Ms. Favaloro identified an equipment operator position with the City of Beaumont. The position required operating heavy equipments such as a bulldozer, hydraulic excavator or dump truck. Occasional lifting, carrying, pushing or pulling up to 50 pounds was required. The worker was required to climb into the equipment and use his upper and lower extremities to operate the equipment. Wages were $9.00 per hour and Ms. Favaloro reported Dr. Neblett indicated Claimant is capable of performing this position. (Tr. 135; EX-1, pp. 38-39).

Another equipment operator position was identified with the Beaumont, Texas drainage department. This position required operation of a backhoe, excavator, bulldozer or dump truck. Occasional carrying, lifting, pushing or pulling up to 50 pounds was required. The salary was $9.00 per hour. (Tr. 135; EX-1, p. 39).

Ms. Favaloro identified a warehouse worker position with Kelly Services, which is a temporary employment agency. This position required the worker to operate a forklift, verify orders and complete paperwork. There was alternate sitting,

standing and walking with occasional lifting up to 25 pounds. The salary was $8.00 per hour. Ms. Favaloro did not indicate the location of this job. (Tr. 135-36; EX-1, p. 39).

Ms. Favaloro identified a service representative position with Lincare in Beaumont, Texas. The job entailed delivery of medical equipment and respiratory products to patients' homes. Lifting was "mostly less than 50 pounds; it is occasionally up to 50 pounds." Workers are permitted to change postural positions throughout the day. Wages were $10.00 per hour. (Tr. 136; EX-1, p. 39).

Lastly, Ms. Favaloro identified a rental clerk position with Star Rental Purchase. The job required answering phones, filing, photocopying and data entry. Alternate standing and walking was required with sitting permitted when the worker is "not busy." There was occasional lifting of up to 50 pounds and assistance from other workers is provided. The starting salary was $6.00 per hour to $7.00 per hour. (Tr. 136-37; EX-1, p. 39).

Ms. Favaloro testified the above-detailed positions were not the only jobs available to Claimant. She noted the Texas Workforce Commission maintains a list of jobs but does not identify the employers. Therefore, she was unable to contact these employers to obtain the specifics of the positions and thus did not include these positions in her labor market survey. (Tr. 137).

Ms. Favaloro confirmed, based on Claimant's educational background, his work experience, his statements as to his physical limitations, his medical history and Dr. Neblett's restrictions, Claimant is readily employable in the Orange/Beaumont, Texas area in the positions listed above. (Tr. 137-38, 193). She reported he could earn between minimum wage, i.e., $5.15 per hour, and $10.00 per hour. (Tr. 138).

Linda Farris

Ms. Linda Farris was requested by the Office of Workers' Compensation Programs (OWCP) to perform vocational rehabilitation for Claimant on April 21, 1999. (EX-2, p. 7). Ms. Farris closed the file on July 30, 1999, because she could not locate Claimant. (EX-2, p. 2).

The Contentions of the Parties

Claimant contends that he was temporarily and totally disabled from May 12, 1997 to March 31, 1998, and was permanently and totally disabled from April 1, 1998 to May 11, 1999, at the stipulated average weekly wage of $370.00 as a result of his May 12, 1997 work accident. Claimant further contends he is permanently and partially disabled from May 12, 1999 and continuing, based on a post-injury wage-earning capacity of $233.52 per week.

Employer/Carrier, on the other hand, contend that both Drs. Neblett and Barrash have opined Claimant is capable of engaging in gainful employment from April 1, 1998 through the present. Employer/Carrier further contend the vocational rehabilitation specialist has testified Claimant is capable of working and earning an amount either equal to, or in excess of, what he was earning at the time of his May 12, 1997 injury.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Claimant's Disability

The parties stipulated, and I find, that Claimant suffered an injury on May 12, 1997, within the course and scope of his employment with Employer. Therefore, I find and conclude that Claimant has sustained a disabling injury under the Act. However, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching MMI is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or

usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once the claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of MMI. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of MMI is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and MMI will be treated concurrently for purposes of explication.

In light of the testimonial and medical evidence of record, I find Claimant was temporarily and totally disabled from the date of injury, May 12, 1997 to March 31, 1998, when Dr. Neblett opined, and the parties stipulated, Claimant had reached MMI on April 1, 1998.

From April 1, 1998, Claimant argues he is permanently disabled, regardless of whether he is found to be totally or partially disabled after this date. The record reveals Dr. Neblett released Claimant ". . . for resumption of working responsibilities effective today, April 1, 1998." Dr. Neblett did not document any restrictions at that time. He later clarified, though, he would not want Claimant performing "repetitive" tasks. Claimant in fact returned to work on May

12, 1999. Claimant however returned to Dr. Neblett on August 16, 2000, with complaints of back pain. At that time, Dr. Neblett issued a "Disability Certificate" and reported Claimant was "Totally Incapacitated" from August 16, 2000 until "undetermined at this time."

Based on the foregoing, I find Claimant was temporarily and totally disabled from May 12, 1997 to March 31, 1998. Claimant's former job with Employer was considered at a physical demand level greater than medium work. Ms. Favaloro recommended Claimant return to work in a less strenuous work category. Dr. Barrash placed physical restrictions on Claimant of no lifting more than 40 to 50 pounds, no repetitive bending and an allowance for alternate sitting, standing and walking. He would not recommend Claimant return to a welding position requiring long periods of squatting. He opined Claimant was capable of working in a light to medium job classification. Claimant has continued to report lower back pain and has been determined to have reached MMI with restrictions of no repetitive heavy tasks by Dr. Neblett. Thus, Claimant has established a prima facie case of total disability under the Act from April 1, 1998 and continuing because he cannot return to the duties of his former job.

B. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane, 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability

require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In the present matter, Employer/Carrier rely on the labor market surveys of Ms. Favaloro and the testimony and reports of Drs. Neblett and Barrash to establish suitable alternative employment when Claimant reached MMI on April 1, 1998. Claimant proffers his own testimony in rebuttal.

Initially, I note Claimant has acquiesced in the total disability argument and contends suitable alternative employment was established on May 12, 1999, when he returned to work with Crown Pipe Shop, thus rendering him permanently and partially disabled as of May 12, 1999.

Claimant therefore, citing Richardson v. General Dynamics Corp., 19 BRBS 48, 49 (1986), contends the best estimate of his post-injury wage-earning capacity is his actual earnings for the period between May 12, 1999 and September 29, 2000. He argues that during a 71 3/7 week period, he earned $18,961.01, which renders a post-injury wage-earning capacity of $265.45 per week. Claimant further argues this figure should be adjusted for inflation using the increase in the national average weekly wage (NAWW) from the date of his work injury. He contends the NAWW changed 12.03% between May 1997 and September 2000, or $31.93 per week.[6] Thus, Claimant contends, his post-injury wage-earning capacity from May 12, 1999 through the present is $233.52 ($265.45 - $31.93 = $233.52) per week, or $5.84 per hour, based on a forty hour work week. Accordingly, Claimant asserts he has a loss of wage-earning capacity of $136.48 ($370.00 - $233.52 =

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[6] Using the Richardson analysis, I find the NAWW changed 12.51% from May 1997 to September 2000. In May 1997, the NAWW was $400.53, and in September 2000, it was $450.64. Therefore, the NAWW changed 12.51% ($450.64 - $400.53 = $50.11 ÷ $400.53 = 12.51%). Adjusting Claimant's wage-earning capacity of $265.45 downward to the level it would have been at the time of the injury computes to a reduction of $35.21 ($265.45 x .1251 = $35.207). Thus, I find and conclude that Claimant's adjusted post-injury wage-earning capacity from May 1999 through September 2000 is $232.24 ($265.45 - $33.21 = $232.24) per week, or $5.81 per hour, based on a forty hour work week.

$136.48), therefore entitling him to $90.99 per week in compensation benefits ($136.48 x **b** = $90.99).[7]

When post-injury wages are used to establish a claimant's wage-earning capacity and determine his permanent partial disability benefits, Sections 8(c)(21) and 8(h) of the Act require that the "claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury." Quan v. Marine Power & Equipment Co., 30 BRBS 124, 127 (1996); Richardson v. General Dynamics Corp., supra; Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 695 (1980). A disabled workers' post-injury earnings can only "fairly and reasonably represent his wage-earning capacity" if they "have been converted to their equivalent at the time of the injury." Sproull v. Director, OWCP, 86 F.3d 895, 899 (9th Cir. 1996). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. Kleiner v. Todd Shipyards Corp., 16 BRBS 297, 298 (1984).

The Board has held that the NAWW should be used when "the actual wages paid at the time of injury in claimant's post-injury job are unknown." Richardson, supra at 331. On the other hand, however, when evidence does establish the actual wage a claimant's post-injury job paid at the time of injury, rather than using the NAWW, the adjustment for inflation in determining the effect of the injury on wage-earning capacity is made simply by comparing the average weekly wage with the post-injury job's actual wage at the time of injury. Kleiner, supra at 298; Bethard, supra at 695; Turney, supra at 238. Thus, only when there is no evidence to determine what the post-injury job paid at the time of injury is the NAWW applied to adjust the claimant's post-injury wages downward.

Accordingly, in this matter the NAWW will be applied to adjust Claimant's post-injury wages as there is no record evidence of what Claimant's post-injury jobs paid at the time of

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[7] Claimant alternatively argues that if it is determined there is no present loss of earning capacity, then he is entitled to a *de minimis* award under Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997), because substantial medical evidence indicates he will likely endure additional medical procedures and have a reduced earning capacity in the future.

his May 12, 1997 work accident. Therefore, I find and conclude that suitable alternative employment was established when Claimant returned to work on May 12, 1999, and his reduced weekly wage-earning capacity from the jobs he held throughout 1999 and 2000 is $232.24, thus rendering an hourly wage of $5.81.

Employer/Carrier initially contend Claimant has been "perfectly capable of returning to gainful employment" since April 1, 1998. Employer/Carrier assert Ms. Favaloro testified if Claimant sought employment between April 1998 and December 1998, he would have found a job. No specific job duties or physical demands were identified retroactively for any employment position in 1998. Employer/Carrier must establish the precise nature and terms of job opportunities to show suitable alternative employment. See Piunti, supra. Therefore, I find the earliest time at which suitable alternative employment may be established is when Claimant actually returned to work on May 12, 1999.

Employer/Carrier next assert Claimant has been "readily employable" since May 12, 1999, and "his earnings at the various jobs [he has held since May 12, 1999] should be considered as they are for the period he actually worked, and should not be averaged out over the entire year, or the entire time span since this would not be representative of his actual wage earning capacity."

Employer/Carrier further point out Ms. Favaloro identified several positions in her two labor market surveys which establish suitable alternative employment. The May 23, 1999 labor market survey was sent to Drs. Neblett and Barrash for approval. Dr. Neblett, Claimant's treating physician, expressed concerns about the repetitiveness in physical activity of some of the positions identified. For that reason, he only approved the optical lab technician, production worker and unarmed security guard positions. Noting all but one position was "fairly nonvigorous," Dr. Barrash approved all the positions except the slot attendant position. As Claimant's treating physician reviewed the labor market surveys upon receiving it in May or June 1999 and again at his deposition on February 1, 2001, I find Claimant was capable of performing the optical lab technician, production worker and unarmed security guard positions on May 23, 1999.

Using the Richardson analysis, the NAWW changed 8.81%

between May 1997 and May 1999 ($435.80 - $400.53 = $35.27 ÷ $400.53 = 8.81%). Therefore, the following positions, which Claimant was deemed capable of performing on May 12, 1997, will have their respective salaries adjusted downward 8.81% to reflect the 1997 wages. Richardson, supra.

The optical lab technician paid minimum wage, or $5.15 per hour. The production worker paid $6.65 per hour. The unarmed security guard position paid between $5.15 and $6.25 per hour. If Claimant were to earn the entry level of $5.15 per hour working as an unarmed security officer, his residual wage earning capacity would be $212.70. This figure is derived by averaging the hourly rates of those positions deemed to be suitable alternative employment and multiplying the average hourly wage by forty (40) hours per week ($4.70[8] + $6.06[9] + $4.70[10] + $5.81[11] = $21.27 ÷ 4 = $5.32 per hour x 40 hours per week = $212.70). Using the same analysis, if Claimant were to earn $6.25 per hour working as an unarmed security officer, his residual earning capacity would be $222.70 ($4.70 + $6.06 + $5.70[12] + $5.81 = $22.27 ÷ 4 = $5.57 per hour x 40 hours per week = $222.70). These two residual wage earning capacities are discounted as it is not established what Claimant's hourly wage would be if he were to be hired as an unarmed security officer,

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[8] This figure is derived by adjusting Claimant's $5.15 hourly wage for the optical lab technician position downward 8.81%, thus rendering an adjusted hourly wage of $4.70.

[9] This figure is derived by adjusting Claimant's $6.65 hourly wage for the production worker position downward 8.81%, thus rendering an adjusted hourly wage of $6.06.

[10] This figure is derived by adjusting Claimant's $5.15 hourly wage for the entry level wage of the unarmed security guard position downward 8.81%, thus rendering an adjusted hourly wage of $4.70.

[11] This figure is adjusted post-injury wage-earning capacity for the positions Claimant actually worked from May 1997 to September 2000. See footnote 6, supra.

[12] This figure is derived by adjusting Claimant's $6.25 hourly wage for the highest possible wage of the unarmed security guard position downward 8.81%, thus rendering an adjusted hourly wage of $5.70.

whether at the entry level or the highest wage.

If Claimant were to earn $5.70 per hour (the average of the two possible hourly wage ranges) working as an unarmed security officer, his residual wage earning capacity would be $217.70 ($4.70 + $6.06 + $5.20[13] + $5.81 = $21.77 ÷ 4 = $5.44 per hour x 40 hours per week = $217.70). This residual wage earning capacity is substantially similar to the actual adjusted post-injury wages earned by Claimant. Accordingly, I find that suitable alternative employment was established on May 12, 1999, the day Claimant returned to work, with a reduced wage-earning capacity of $217.70 per week.

Employer/Carrier submitted a second labor market survey on February 7, 2001. Dr. Barrash approved all the positions listed therein and Dr. Neblett did not render an opinion as to those jobs. Considering Claimant's restriction of no repetitive tasks, I find the following ten positions appropriate: unarmed security guard at Hermann Baptist Hospital ($6.00 per hour), parts clerk ($6.00 per hour), pest control technician ($10.00 per hour), meter-reader ($8.00 per hour), optical lab technician ($5.15 per hour), equipment operator with City of Beaumont ($9.00 per hour), equipment operator with Drainage Department ($9.00 per hour), warehouse worker ($8.00 per hour), service representative ($10.00 per hour) and rental clerk ($6.00 per hour). I find the armored car driver position with Brinks Security unacceptable as there is no specificity with regards to the salary as there was no comparison between the New Orleans, Louisiana, and Houston, Texas, salaries and the Beaumont, Texas, salary. I find the vending route driver position unacceptable as suitable alternative employment as this is a repetitive task job, from which Claimant's physicians restricted him. And, I find the cage cashier position with Isle of Capri Casino in Lake Charles, Louisiana, unacceptable as the position is too far distant, approximately 60 miles, from Claimant's home in the Beaumont, Texas, area to be deemed suitable.

Using the Richardson analysis, the NAWW changed 16.58% between May 1997 and February 2001 ($466.91 - $400.53 = $66.38

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[13] This figure is derived by adjusting Claimant's $5.70 hourly wage (the average between the entry level wage and the highest possible wage of the unarmed security guard position) downward 8.81%, thus rendering an adjusted hourly wage of $5.20.

÷ $400.53 = 16.58%). Therefore, the following positions, which Claimant was deemed capable of performing after February 7, 2001, will have their respective salaries adjusted downward 16.58% to reflect the 1997 wages. Richardson, supra.

Based on the foregoing, I find that Claimant's residual wage-earning capacity after February 7, 2001 is $257.48. This figure is derived by taking the average of the adjusted salaries from the positions Claimant was deemed able to perform as follows: $5.01[14] + $5.01[15] + $8.34[16] + $6.67[17] + $4.30[18] + $7.51[19] + $7.51[20] + $6.67[21] + $8.34[22] + $5.01[23] = $64.37 ÷ 10 = $6.44 x 40

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[14] This figure is derived by adjusting Claimant's $6.00 hourly wage for the unarmed security guard at Hermann Baptist Hospital downward 16.58%, thus rendering an adjusted hourly wage of $5.01.

[15] This figure is derived by adjusting Claimant's $6.00 hourly wage for the parts clerk position downward 16.58%, thus rendering an adjusted hourly wage of $5.01.

[16] This figure is derived by adjusting Claimant's $10.00 hourly wage for the pest control technician downward 16.58%, thus rendering an adjusted hourly wage of $8.34.

[17] This figure is derived by adjusting Claimant's $8.00 hourly wage for the meter-reader position downward 16.58%, thus rendering an adjusted hourly wage of $6.67.

[18] This figure is derived by adjusting Claimant's $5.15 hourly wage for the optical lab technician downward 16.58%, thus rendering an adjusted hourly wage of $4.30.

[19] This figure is derived by adjusting Claimant's $9.00 hourly wage for the equipment operator with City of Beaumont downward 16.58%, thus rendering an adjusted hourly wage of $7.51.

[20] This figure is derived by adjusting Claimant's $9.00 hourly wage for the equipment operator with City of Beaumont Drainage Department downward 16.58%, thus rendering an adjusted hourly wage of $7.51.

[21] This figure is derived by adjusting Claimant's $8.00 hourly wage for the warehouse worker position downward 16.58%,

hours per week = $257.48).

Claimant contends that the vocational record submitted in this matter is devoid of any evidence that the jobs identified by Ms. Favaloro are full-time jobs at 40 hours per week. Therefore, a loss in wage earning capacity could not be calculated with respect to the positions identified by Ms. Favaloro. However, Ms. Favaloro testified at the hearing that the positions she identified, and their respective salaries, are full-time 40 hours per week jobs. (Tr. 174). Therefore, I reject this contention by Claimant.

Since suitable alternative employment was not established until May 12, 1999, upon Claimant's return to work, Claimant was permanently and totally disabled from April 1, 1998 to May 11, 1999. Although Claimant contends he was totally disabled from August 2000 and continuing because he worked in pain and was considered "totally incapacitated" by Dr. Neblett, he testified he continued to work with tolerable pain. Therefore, I find he was not totally disabled but rather partially disabled. Claimant became permanently partially disabled from May 12, 1999 and continuing until February 6, 2001 with an adjusted weekly wage earning capacity of $232.24. From February 7, 2001 and continuing thereafter, Claimant remains permanently partially disabled with an adjusted weekly wage earning capacity of $257.48. Although in August 2000, Dr. Neblett took Claimant off work because of increased back pain, he continued to perform work as discussed above.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall

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thus rendering an adjusted hourly wage of $6.67.

[22] This figure is derived by adjusting Claimant's $10.00 hourly wage for the service representative position downward 16.58%, thus rendering an adjusted hourly wage of $8.34.

[23] This figure is derived by adjusting Claimant's $6.00 hourly wage for the rental clerk position downward 16.58%, thus rendering an adjusted hourly wage of $5.01.

be liable for an additional 10 percent penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier paid Claimant temporary total disability benefits from June 20, 1997 to December 25, 1998 at the rate of $246.67 per week for a total of $19,523.00. Employer filed a Notice of Controversion on June 26, 1997. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[24] Thus, Employer was liable for compensation on June 30, 1998. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a Notice of Controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981). A Notice of Controversion should have been filed by July 23, 1997 to be timely and prevent the application of penalties. I find and conclude that Employer filed a timely Notice of Controversion on June 26, 1997, and therefore, is not subject to Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific

[24] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[25] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary and total disability from May 12, 1997 to March 31, 1998, based on Claimant's stipulated average weekly wage of $370.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for

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[25] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **May 19, 1999**, the date the matter was referred from the District Director.

permanent and total disability from April 1, 1998 to May 11, 1999, based on Claimant's stipulated average weekly wage of $370.00, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent and partial disability from May 12, 1999 to February 6, 2001, based on the difference between Claimant's average weekly wage of $370.00 and his adjusted weekly earning capacity of $232.24, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay Claimant compensation for permanent and partial disability from February 7, 2001 and continuing, based on the difference between Claimant's average weekly wage of $370.00 and his adjusted weekly earning capacity of $257.48, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 12, 1997 work injury, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 26th day of June 2001, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge